Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1216

LAWRENCE J. SYROVATKA and
LORRAINE A. SYROVATKA,

Petitioners,

vs.

ELDIN J. EHRLICH, State Department of Public Welfare, and LEONE LILLIEDAHL, Director of Saunders County Department of Public Welfare, and JOHN AND MARY DOE, real names unknown, PRESENT CUSTODIANS OF THE MINOR CHILDREN, HAROLD SYROVATKA and TIMOTHY SYROVATKA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

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LAWRENCE J. SYROVATKA and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LAWRENCE J. SYROVATKA and LORRAINE A. SYROVATKA, your petitioners, respectfully pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on October 31, 1979.

OPINIONS BELOW

This cause was decided by Circuit Judges Ross and Stephenson, and District Judge McManus sitting by designation, on October 31, 1979. The opinion is reproduced as Appendix A hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 31, 1979.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

———o———

QUESTION PRESENTED

Whether or not the parental rights of Petitioners may be terminated when they were not afforded adequate notice of the proceedings in violation of the process clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 3 of the Nebraska Constitution.

———o———

STATEMENT

The Petitioners are husband and wife, and natural parents of Timothy and Harold Syrovatka, minor children. On January 4, 1967, Saunders County, Judge Merle D. Edstrom entered an order finding that Timothy and Harold Syrovatka were neglected children, and committed such children to the permanent custody of the State Department of Public Welfare of the State of Nebraska. The Court records show that the petitioners were present in court. The Court record does not show that an attorney appeared with the Petitioners or that they received notice of the actual legal or factual basis for termination of their parental rights by the Saunders County Court.

The proceedings to terminate the parental rights of the Petitioners concerning Timothy and Harold Syrovatka were commenced by a petition in Saunders County, Nebraska filed on December 21, 1965. This petition is couched in very vague and general terms stating that the Petitioners did not provide proper parental care. A motion was made and filed on November 30, 1966, for a hearing on the petition concerning the Petitioners' children. By order of the Court dated November 30, 1966, a hearing was held on the 2nd day of December, 1966, concerning alleged neglect of the Petitioners' children. On December 2, 1966, an order was entered placing the Petitioners' children in a foster home until further order of the court. A further order was made setting the termination hearing for the 27th day of December, 1966. For some reason unknown to counsel the hearing was not held on that date but the hearing was held on the 4th day of January, 1967. At this hearing the court entered an order terminating the parental rights of the Petitioners and placed the minor children of the Petitioners in the custody of the State Department of Public Welfare of the State of Nebraska. As stated previously the record is devoid of any indication of any legal or factual basis of termination of the parental rights of the Petitioners.

On December 30, 1968, the Petitioners received a notice from the Department of Public Welfare that the children had been placed and adopted. The Petitioners did not have any knowledge of this adoption and obviously did not consent to it in any way. Prior to the Petitioners' receipt of notice of the adoption the Petitioners contacted and retained an attorney to help them regain custody of

their children. No action was taken by this attorney and in 1967 they contacted another attorney to help them with this problem. This attorney took no action for several years but finally on March 6, 1972, he filed a habeas corpus action in the District Court of Lancaster County, Nebraska. The District Court on the 25th day of April, 1972, dismissed the Petitioners' writ and denied the habeas corpus. This order of the court was appealed to the Supreme Court of the State of Nebraska on May 25, 1972. The Petitioners had to retain other counsel to prosecute the appeal and this was done with final determination by the Supreme Court of the State of Nebraska on June 15, 1973.

Subsequently, the Petitioners filed their writ of habeas corpus in the United States District Court in the District of Nebraska on February 3, 1978. A hearing was held by the Court on December 22, 1978, and the Court entered an order denying the writ of habeas corpus on January 9, 1979.

The order denying the writ of habeas corpus was appealed to the United States Court of Appeals for the Eighth Circuit on February 23, 1979. The case was submitted to the Court on October 10, 1979 and an order affirming the dismissal of the petition was entered on October 31, 1979.

———o———

REASONS FOR GRANTING THE WRIT

This Petition for a writ of certiorari presents a conflict between a statutorily imposed two-year limitation on challenging adoption proceedings, and the Constitution of the United States. Petitioners assert that they have been deprived of their due process rights to notice and hearing

during an adoption proceeding in which their parental rights were terminated. Petitioners additionally assert that the right of parents to full due process before their parental rights can be terminated is so basic, that to allow a statute to arbitrarily impose a time limitation would violate both the spirit and letter of the Constitution.

In considering the question as to whether Petitioners' rights to due process have been violated, the Court of Appeals of the Eighth Circuit agreed with Petitioners, correctly stating in their opinion, "We agree with appellants that there is evidence the notice of the termination hearing did not adhere to the due process standards announced in *Alsager*".

The Eighth Circuit nonetheless held against the Petitioners on the basis that any right to protest termination of their parental rights was statutorily precluded. While statutes are necessary to provide a framework for the operation of the law, any utilization of statutes to deprive Petitioners of their fundamental rights to due process before their parental rights can be terminated is patently unjust and forbidden by the Constitution. To allow the Constitution of the United States to be countervened by a time period set down by a single state legislature would circumvent the intent of the framers. The weight of the testimony and evidence presented demonstrates a gross violation of Petitioners' rights in direct contravention of the United States Constitution.

Petitioners seek only what is in the best interests of their children. They have even gone so far as to suggest in their brief to the Eighth Circuit that the best interests of the children may be served by granting Petitioners some limited contact or visitation instead of full custody.

However, these are issues which can only be properly resolved during a full hearing with all parties present. This type of hearing was not held due to the fact Petitioners received no notice and, as such, what is in the best interest of Petitioners' children has never been properly resolved.

The rights to proper notice and a full hearing with all parties present when basic family rights are involved is a fundamental concept embodied throughout the cornerstone document of our country, the Constitution of the United States. This fundamental concept should not be allowed to be abridged by a two-year limitation set forth by one state statute.

Petitioners, as citizens and parents, ask only for the basic rights granted by the Constitution. They request the Eighth Circuit Court of Appeals be upheld in its finding that the due process of Petitioners have been violated. However, they also ask that the Eighth Circuit finding that fundamental parental rights can be statutorily superceded not be upheld.

CONCLUSION

For these reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners Lawrence and Lorraine Syrovatka

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1269

Lawrence J. Syrovatka and Lorraine A. Syrovatka, on behalf of Harold Syrovatka and Timothy Syrovatka, minors,
Appellants,

vs.

Eldin J. Erlich, Director of State Department of Public Welfare and Leone Lilliedahl, Director of Saunders County Department of Public Welfare and John and Mary Doe, real names unknown, present custodians of the minor children, Harold Syrovatka and Timothy Syrovatka,
Appellees.

Appeal from the United States District Court
for the District of Nebraska

Submitted: October 10, 1979
Filed: October 31, 1979

Before ROSS and STEPHENSON, Circuit Judges, and McMANUS*, District Judge.

* The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

STEPHENSON, Circuit Judge.

This action arose on an application for writ of habeas corpus under 28 U.S.C. § 2254, filed by Lawrence and Lorraine Syrovatka (appellants) to gain custody of their minor children.[1] The district court[2] dismissed the writ. Appellants allege that the termination of their parental rights is invalid because they received inadequate notice of the hearing, in violation of their Fourteenth Amendment due process rights. The resulting adoption is likewise invalid, appellants argue, because it lacked the consent of the natural parents. We affirm the dismissal of the petition for writ of habeas corpus.

The order at issue was entered by the county judge of Saunders County, Nebraska, after a hearing on January 4, 1967. The order declared that Tim and Harold Syrovatka were "neglected children and children in need of special supervision." The order committed both to the custody of "the State Department of Public Welfare of the State of Nebraska, there to be received, cared for, educated and kept until each shall arrive at the age of 21 years • • •."

On October 2, 1968, the children were adopted with the consent only of the Department of Public Welfare, consistent with the provisions of Neb. Rev. Stat. § 43-209 (Reissue 1978). The Syrovatkas were notified of the adoption by letter dated December 30, 1968.

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1 On appeal appellants seek alternative relief; see note 5 *infra*.

2 The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

On March 6, 1972, a habeas corpus action attacking the order of commitment was filed in the District Court for Lancaster County, Nebraska. After a full evidentiary hearing at which the parents testified, the district court dismissed the petition. The Nebraska Supreme Court affirmed the dismissal. *Syrovatka v. Graham*, 208 N. W. 2d 281 (Neb. 1973). That court based its conclusion on two grounds. (1) The district court properly concluded that the parents were in court and therefore had notice of the hearing; and (2) appellants were barred by Neb. Rev. Stat. § 43-116 (Reissue 1978), which establishes a two-year period for challenging adoption proceedings, and laches from attacking the validity of the adoption occurring more than three years after they received notice of the adoption, and more than five years after the hearing which terminated their parental rights.

On February 3, 1978, appellants filed an application for writ of habeas corpus in federal district court. A hearing was held on December 22, 1978, and an order dismissing the writ was entered on January 9, 1979.

The evidence and testimony presented in the state and federal habeas corpus hearings on the issue of the notice to appellants of the parental rights termination hearing must be examined on this appeal.

The first petition alleging that all six of the Syrovatka children were neglected was filed in December 1965. Tim and Harold Syrovatka, the minor children involved in the present action, were not taken from their parents' custody at this time, although a hearing was held. On November 30, 1966, the county attorney by written motion declared that Tim and Harold Syrovatka were again ne-

glected children. An order from the county judge setting a hearing for December 2, 1966 ordered both the parents and children to appear personally before the court. At this time, both parents were in the county jail awaiting criminal charges. Lawrence Syrovatka was represented by counsel in the criminal matter. The sheriff signed a certification that the order for the December 2, 1966 hearing was served on the appellants.

An order from the county judge on December 2, 1966, states that a hearing was held and the parents were present in court. A continuance until December 27, 1966 was ordered so that Lawrence Syrovatka could make arrangements to be represented by an attorney in the child custody matter. The children were ordered to be placed in temporary custody of the welfare director for placement in foster homes until further court order. A copy of the order was directed to be delivered to Lawrence Syrovatka in the county jail.[3]

On December 27, 1966, the matter was continued until January 4, 1967, when the order committing the children to the State Department of Public Welfare was entered. That order also recited "[p]resent in court are Lawrence

3 Temporary custody was necessary because both Lawrence and Lorraine Syrovatka were confined in the county jail at the time pending charges for child abusement. Additionally, Lawrence Syrovatka was awaiting trial for a statutory rape charge on which he was acquitted in March 1967. The Syrovatkas contend they did not get a copy of this order.

Syrovatka and Lorraine Syrovatka, father and mother of the above named children."[4]

Based on this evidence, and the testimony of the parents at the hearing on the state habeas action, the Nebraska courts determined that appellants had notice of the January 4, 1967 hearing and were in fact present. The federal district court, on the basis of the state record and its own hearing, concluded that the fact-finding procedure employed by the state court was adequate, that a full and fair hearing was had, and the material facts were adequately developed at the state court hearing. On this basis, the federal district court properly concluded that the appellants had notice of the hearing.

It is the duty of the district court to apply the applicable federal law to the state court's findings independently. *Townsend v. Sain*, 372 U. S. 293, 318 (1963). A finding that the parents were present at the hearing does not necessarily mean that the notice complied with procedural due process. The procedural due process requirements for parental rights termination hearings were announced in *Alsager v. District Court of Polk County*, 406 F. Supp. 10, 24-25 (S. D. Iowa 1975), *aff'd*, 545 F. 2d 1137 (8th Cir. 1976). The notice requirements outlined in *In re Gault*, 387 U. S. 1 (1967) were applied to parental termination hearings in *Alsager*. This court approved of the district court's holding that:

> notice should include the date, time and place of the hearing; a clear statement of the purpose of the pro-

4 Both parents dispute being present on that date. It is also unclear from the record whether an attorney, who had been present at criminal hearings at the time, was consulted concerning the custody hearing.

> ceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed commitment; and a statement of the legal standard upon which commitment is authorized.

406 F. Supp. at 25 (quoting *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M. D. Ala. 1974)).

The appellant's argument is that even if they were present in court for the hearing, they were not given adequate notice of the hearing as required by *Alsager*. The district court did not address that issue. The state court records and the testimony of the appellants concerning notice is confusing and at times contradictory. We agree with the appellants that there is evidence the notice of the termination hearing did not adhere to the due process standards announced in *Alsager*.

Appellants' application for writ of habeas corpus must be dismissed for other reasons, however. This conclusion would not be altered by a finding that due process notice standards were not fully satisfied.

The first reason for dismissing the application for writ of habeas corpus is that the opportunity to challenge the adoption proceeding by collateral attack is no longer available to the appellants. *Hiatt v. Menendez*, 62 N. W. 2d 123 (Neb. 1954) held that Neb. Rev. Stat. § 43-116 (Reissue 1978) does contemplate that an adoption may be challenged for irregularity in the adoption proceedings. However, the action must be brought within two years. The applicable provision of that statute states:

> When any county court in the State of Nebraska shall * * * hereafter enter of record such a decree of adoption, it shall * * * be conclusively presumed that said adoption and all instruments and proceedings in

> connection therewith are valid in all respects notwithstanding some defect or defects may appear on the face of the record, or the absence of any record of such court, unless an action is brought within two years from the entry of such decree of adoption attacking its validity.

Neb. Rev. Stat. § 43-116 (Reissue 1978). In *Hiatt* the court ruled that because the adoption was challenged more than three years after the rendition of the decree, appellant was barred by the statute from taking advantage of the irregularity.

The Syrovatkas brought their first action challenging the adoption in 1972. Even if the date appellants learned of the adoption, which was receipt of a letter dated December 30, 1968, is used, the action was brought more than three years after notice of the adoption. In such a case, the conclusive presumption of validity contained in section 43-116 operates to bar the subsequent action challenging the defect. *See Syrovatka v. Graham*, 208 N. W. 2d at 283

"[A] conclusive presumption will be upheld so long as it is reasonable." *Shanahan v. United States*, 447 F. 2d 1082, 1084 (10th Cir. 1971). Here the State of Nebraska has a legitimate and important interest in establishing a stable environment for adopted children. This statute requiring an action challenging an adoption proceeding to be brought within two years of the adoption has a reasonable relation to this legitimate state purpose.

Additionally, in a habeas corpus proceeding involving child custody, the best interests of the children remain paramount. As stated by the Nebraska Supreme Court:

> Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.

Christopherson v. Christopherson, 129 N. W. 2d 113, 115 (Neb. 1964).

In considering the best interests of Tim and Harold Syrovatka, it cannot be overlooked that the adoption took place over eleven years ago, and custody was awarded the state nearly thirteen years ago. By the end of the year, the boys will be sixteen and eighteen years of age. When the Nebraska Supreme Court considered this issue in the Syrovatka appeal over six years ago, it stated that "[t]o disturb the present relationship at this late date would be a cruel travesty on justice." *Syrovatka v. Graham*, 208 N. W. 2d at 283. This court agrees that to remove the children now from their adoptive homes would not serve their best interest.[5]

For these reasons we affirm the dismissal of the application for writ of habeas corpus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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5 Appellants admit as much in their brief. The prayer for relief now suggests that the best interests of the children may be served by some limited contact or visitation, and seeks a remand for the district court to consider this issue.

Supreme Court, U. S.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

BRIEF OF RESPONDENTS IN OPPOSITION

—o—

I.

OPINION BELOW

The opinion brought into question by the petitioners is *Lawrence J. Syrovatka, et al. v. Eldin J. Ehrlich, etc., et al.*, No. 79-1269, United States Court of Appeals for the Eighth Circuit.

—o—

II.

JURISDICTION

The respondents accept the petitioners' invocation of this Court's jurisdiction.

———o———

III.

QUESTION PRESENTED

The respondents accept petitioners' statement of questions presented to the extent that the case does involve the termination of parental rights. The petitioners have argued the matter of prior notice. Respondents contend there was in fact notice and contend that there are the issues of a valid adoption and the best interests of the children.

———o———

IV.

STATEMENT OF THE CASE

This is an action attacking an order of commitment (to the Nebraska State Department of Welfare) and the subsequent adoption of two minor children. The two children were committed on January 4, 1967, into the permanent custody of the State of Nebraska, Department of Public Welfare, by an order of the Saunders County, Nebraska, Court. With the consent of the Department of Public Welfare, they were adopted on October 2, 1968,

pursuant to an order of a Nebraska county court. A petition for habeas corpus was filed in state district court on March 6, 1972, collaterally attacking the court's jurisdiction to enter the commitment order. It alleged the 1967 commitment was void for want of notice to petitioners, even though the commitment order states: "Present in court are Lawrence Syrovatka and Lorraine Syrovatka, father and mother of the above named children."

The State of Nebraska Department of Public Welfare resisted the habeas corpus action asserting, along with other defenses, that an action attacking the validity of an adoption decree must be brought within two years after the rendition of that adoption decree and that the welfare of the children is paramount to the wishes of the parents. Following a trial in state district court, the late Honorable Elmer M. Scheel, District Judge, dismissed the petition and refused to grant the writ of habeas corpus. The petitioners appealed to the Supreme Court of Nebraska alleging that the lower court erred in not making a finding of fact that no notice of the January 4, 1967, commitment hearing in the county court or notice of the adoption proceedings were served on the parents, that the parents' constitutional rights were violated, and that the court should have furnished the parents the names of the adoptive parents. The Nebraska Supreme Court rejected petitioners' arguments, holding that the record indicated that they were in fact in court at the time of the hearing on the commitment and that there was in fact notice of the adoption proceedings.

In affirming the dismissal of the habeas corpus action in state court, the Nebraska Supreme Court noted that

the order of commitment was entered five years and two months before the filing of the petition, and that the adoption had been completed for three years and five months before its filing. Lawrence J. Syrovatka and Lorraine A. Syrovatka, the natural parents and petitioners in the above described action, petitioned the federal court for a writ of habeas corpus. Following a trial to the United States District Court for the District of Nebraska on December 22, 1978, the Honorable Judge Urbom, on January 9, 1979, ordered that the petition for writ of habeas corpus be dismissed. The order of the United States District Court for the District of Nebraska was appealed to the United States Court of Appeals for the Eighth Circuit by petitioners on October 31, 1979. That court affirmed the order of the United States District Court for the District of Nebraska and dismissed the application for writ of habeas corpus.

—o—

V.

STATEMENT OF FACTS

On January 4, 1967, Saunders County Judge Myrl D. Edstrom, entered an order finding that Timothy Syrovatka and Harold Syrovatka, minor children of Lawrence J. Syrovatka and Lorraine A. Syrovatka, husband and wife, were neglected children and committed said children to the permanent custody of the Nebraska State Department of Public Welfare. In accordance with Neb. Rev. Stat. § 43-906 (Reissue 1974) the Department of Public Welfare used said order of commitment as a basis for placing the children in an adoptive home.

In the order of commitment to the Department of Public Welfare the county court specifically made a finding that petitioners Lawrence Syrovatka and Lorraine Syrovatka were in the court room on the date of the commitment, January 4, 1967.

A decree of adoption was entered by a Nebraska county court on October 2, 1968. Petitioners were notified of this adoption decree by a letter from the State Department of Public Welfare dated December 30, 1968.

—o—

REASONS WHY THE WRIT SHOULD BE DENIED

I.

After two years from entry of decree of adoption, there is conclusive presumption of validity of decree of adoption.

In their petition for writ of certiorari petitioners allege reasons for granting the writ. They state that the case presents a conflict between a statutorily imposed two-year limitation on challenging adoptive proceedings and the Constitution of the United States. They assert that a statute which imposes such a time limitation is in violation of the Constitution. Petitioners point up the fact that the Court of Appeals for the Eighth Circuit indicated that there is evidence that the notice of the termination hearing did not adhere to highest standards of due proc-

ess. Petitioners then attack the Circuit Court's conclusion that petitioners' application for a writ of habeas corpus should be dismissed even if there was a finding that due process notice standards were not fully satisfied for the reason that the opportunity to challenge the adoptive proceedings by collateral attack was no longer available.

Respondents respectfully request that this Court deny the petition for writ of certiorari for the reason that the opinion of the United States Court of Appeals for Eighth Circuit, No. 79-1269 (attached to the Petition for Writ of Certiorari as Appendix A) has resolved the constitutional issues addressed by petitioners and has also considered the best interests of the children.

The adoption decrees in the instant case were entered in October, 1968. The fact that appellants chose not to attack the validity of those decrees until March, 1972, removes from them the *right* to attack the validity of the decrees. In *Hiatt v. Menendez,* 157 Neb. 914, 62 N. W. 2d 123 (1954), a case very similar to the instant case, the validity of an adoption decree was attacked on the basis that an irregularity existed. There the adoption decree was entered on September 17, 1949, and attention was not called to the irregularity until August 13, 1953, when a brief was filed in the Nebraska Supreme Court calling its attention to the irregularity. The court found that an irregularity did exist, but barred the appellant relief with the following comments:

> "The provisions of the statute do contemplate that decrees of adoption may be attacked for irregularity in the proceedings. The provision providing for the attack is stated negatively but nevertheless it purports to grant the right. The provision is, as applied to the facts of this case, that: 'When any county court in the State of Nebraska shall . . . hereafter enter of record such a decree of adoption, it shall . . . be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects notwithstanding some defect or defects may appear on the face of the record, . . . unless an action is brought within two years from the entry of such decree of adoption attacking its validity.' § 43-116, R. R. S. 1943." *Hiatt v. Menendez,* 157 Neb. at 918, 62 N. W. 2d at 126.

The court then commented that the attack on its validity was made more than three years after the rendition of the decrees of adoption. The court then stated:

> "Certainly the appellant was barred by the statute from taking advantage of the irregularity which appeared on the face of the record in the adoption proceeding." *Id.* at 919, 62 N. W. 2d at 127.

Just as the appellant was barred from attacking the validity of the adoption decree in the *Hiatt* case, so must the petitioners in the instant case be barred from attacking the validity of the adoption decrees entered in October, 1968, by an action filed in state court more than three years after the rendition of those adoption decrees and in the United States District Court more than nine years after the decree.

Petitioners challenge the two-year limitation in the statute. The respondents contend conclusive presumption of validity contained in Neb. Rev. Stat. § 43-116 (Reissue 1978) operates to bar the subsequent action challenging the defect. Such was the position of the Supreme Court of Nebraska in the case at bar. *Syrovatka v. Graham,* 190 Neb. 355, 208 N. W. 2d 281 (1973). A conclusive presump-

tion will be upheld so long as it is reasonable. *Shanahan v. United States,* 447 F. 2d 1082, 1084 (10th Cir. 1971). On this point respondents emphasize the language of the Court of Appeals in the case at bar:

> ". . . Here the State of Nebraska has a legitimate and important interest in establishing a stable environment for adopted children. This statute requiring an action challenging an adoption proceedings to be brought within two years of the adoption has a reasonable relation to this legitimate state purpose."

II.

When the statutes require only the consent of the State Department of Public Welfare as to an adoption, it is not necessary to serve notice on any other person, including the natural parent.

In the petition for a writ of certiorari it is alleged that the petitioners did not have any knowledge of this adoption and obviously did not consent to it in any way.

Petitioners have claimed that the district court erred in not making a finding of fact that no notice of the adoption proceedings of Harold and Timothy Syrovatka was served on the petitioners.

By order of the Saunders County Court, dated January 4, 1967, Timothy Syrovatka and Harold Syrovatka were committed to the Nebraska Department of Public Welfare. Subsequent to that commitment, the Department of Public Welfare consented to the adoption of Timothy Syrovatka and Harold Syrovatka, and on October 2, 1968, adoption decrees were issued by a Nebraska county court decreeing the adoption of both Timothy and Harold.

Neb. Rev. Stat. § 43-209 (Reissue 1978) provides in part:

> "In any case where the court shall award a child to the care of the Department of Public Welfare, . . . in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, . . .
>
> ". . .
>
> "When the parental rights have been so terminated and the care of such child is awarded to the Department of Public Welfare, the department shall have authority to consent to the legal adoption of such child *and no other consent shall be required to authorize any court having jurisdiction to enter a legal decree of adoption* of such child. . . .; *Provided,* the Department of Public Welfare, an individual, or an association to whom the care of a child has been committed by a juvenile court *prior to* July 13, 1967, shall have authority to consent to the legal adoption of such child, without an order terminating parental rights. . . ." (Emphasis added.)

The above quoted statute makes it clear that when a child has been committed to the Department of Public Welfare, even without a termination of parental rights, if that child has been committed prior to July 13, 1967, the *only* consent that is required to authorize any court having jurisdiction to enter a legal decree of adoption of a child, is the consent of the Department of Public Welfare.

III.

The welfare of the child is paramount to the wishes of the parent.

There are numerous cases in which the Supreme Court of Nebraska has held that in controversies concerning chil-

dren, the interest of those children is paramount over the interest of any other party. The Nebraska Supreme Court, quoting the holding of many prior cases, reaffirmed this position in *Kaufmann v. Kaufmann*, 140 Neb. 299, 299 N. W. 617 (1941), when it said:

> "'In a controversy for the custody of an infant of tender years the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.' *Schroeder v. State,* 41 Neb. 745, 60 N. W. 89. See, also *Sturtevant v. State,* 15 Neb. 459, 19 N. W. 617; *Giles v. Giles,* 30 Neb. 624, 46 N. W. 916; *Steward v. Elliott,* 113 Neb. 421, 203 N. W. 580; *Smidt v. Benenga,* 140 Ia. 399, 118 N. W. 439; *Ellison v. Platts,* 226 Ia. 1211, 286 N. W. 413." *Id.* at 312.

Even in habeas corpus proceedings, the Nebraska Supreme Court has held that the welfare of the child is the court's primary concern. It was so stated in *Christopherson v. Christopherson,* 177 Neb. 414, 129 N. W. 2d 113 (1964):

> ". . . 'Ordinarily, the basis for the issuance of a writ of habeas corpus is an illegal detention, but in the case of a writ sued out for the detention of a child, the law is concerned not so much about the illegality of the detention as about the welfare of the child.'" *Id.* at 417. See, also, 25 Am. Jur., Habeas Corpus, § 78, p. 203.

In the present case, it is important to note that Harold Syrovatka and Timothy Syrovatka were adopted in October, 1968, that the only home these boys have known for over eleven years is the one in which they now reside, and that to remove them now from the only home they have known would be to cause them to suffer

irreparable harm. Over eleven years ago the couple with whom Harold and Timothy were placed adopted these boys and became "mother" and "father" to them. As was said by the Nebraska Supreme Court in *In re Application of Schwartzkopf,* 149 Neb. 460, 31 N. W. 2d 294 (1948):

> "Adoption proceedings determine more than the custody of the adopted child. It has been held in the case of In re Estate of Enyart, 116 Neb. 450, 218 N. W. 89, that 'Pursuant to this statute, the decree of adoption created, in law, between the adoptive parent and adopted child, *the relation of parent and child,* . . .'" *Id.* at 464. (Emphasis added.)

Thus, it would serve no useful purpose to uproot Timothy and Harold Syrovatka from a security they have come to know and place them with virtual strangers.

In their petition for a writ of certiorari the petitioners suggest that they be granted some limited contact or visitation, if not full custody. However, the suggestion is followed by the statement that such an arrangement could only be effected after a full hearing with all parties present. Timothy will be 19, the age of majority in Nebraska, in November, 1980. Harold will reach the age of majority in December, 1982. Both boys have spent formative years with their adoptive parents. Although no longer children, they still could be adversely affected by a custody hearing as suggested by petitioners. Such would not be in the best interests of these children. As was said by the Supreme Court of Nebraska:

> "The welfare of the child is paramount to the wishes of the parent." *Hausman v. Shields,* 184 Neb. 88, 90, 165 N. W. 2d 581 (1969).

———o———

CONCLUSION

The respondents submit that the welfare of the children will best be served by them continuing to live undisturbed with their adoptive parents.

In view of the above arguments the respondents respectfully request that the petition herein for a writ of certiorari be denied.

Respectfully submitted,

ELDIN J. EHRLICH, State Department of Public Welfare, and LEONE LILLIEDAHL, Director of Saunders County Department of Public Welfare, and JOHN AND MARY DOE, real names unknown, PRESENT CUSTODIANS OF THE MINOR CHILDREN, HAROLD SYROVATKA and TIMOTHY SYROVATKA,

Respondents

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